Al Sharhan Sdn Bhd & Anor v Edipro Construction & Engineering

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCC-23–10 OF 2019
LIZA CHAN JC
14 AUGUST 2020

Civil Procedure — Appeal — Appeal against decision of sessions court — Sessions court allowed plaintiff's claim for a declaration agreement was null and void — Whether sessions court judge had erred in law and finding of fact — Whether plaintiff entitled to relief sought

Contract — Breach — Agreement — Interpretation of agreement — Whether agreement sale and purchase agreement or joint venture agreement — Whether there was valid agreement — Whether there was breach of salient clauses — Whether plaintiff entitled to terminate agreement — Whether plaintiff entitled to relief sought

This was an appeal against the sessions court decision in allowing the plaintiff's claim for a declaration that the agreement dated 20 August 2015 between the respondent and first defendant was null and void, a sum of RM787,661.90 was to be paid by the defendant to the plaintiff, interest and costs of RM5,000; the counterclaim of the defendant was also dismissed with costs of RM3,000. The plaintiff entered into a sales and purchase agreement ('the agreement') with the defendants for a sale and purchase together with the management and use of the water filtration system including the purchase of technology as a whole including a pilot plant at sum of RM650,000 for which RM500,000 of the said sum was the costs of technology and pilot plant, including all equipment which was located at the Sewerage Treatment Plant, Indah Water Consortium ('IWK'), Cyberjaya and RM150,000 being costs of management operations which needed to be carried out on the pilot plant to be carried out at IWK's Sewerage Treatment Plant. The plaintiff's claimed that, in breach of the salient cll 3.3, 4.1 and 4.2 of the agreement, the defendant had failed: (a) to ensure that the water filtration technology was successfully supplied/delivered nor did the defendants provide the rights, benefits and interest to the plaintiff as provided in the agreement; (b) to transfer the technology to the plaintiff despite being given time; and (c) to assist and ensure that the water filtration products and technology was eligible to obtain the National Water Service Commission (SPAN)'s approval when the defendants refused/failed or deliberately refuse to disclose the contents of the formula contained in the water filtration which was a condition for SPAN to grant the approval; The

defendants, on the other hand, alleged, inter alia, that the: (i) plaintiff was aware that the second defendant was illiterate and did not read and write; (ii) defendants would not be involved in getting SPAN approval which was the plaintiff's own responsibility; (iii) plaintiff had acted fraudulently towards the defendants, amongst others, in that the plaintiff had misled and manipulated the second defendant into entering into the contract; (iv) plaintiff had made an unlawful gain as the works for the construction of the water treatment technology system had been completed and handed over to the plaintiff; and (v) defendants having completed their part of the bargain in excess of what was agreed in the agreement but was not paid. The defendants, therefore, counterclaimed against the plaintiff. The sessions court judge ('SCJ') found on a balance of probabilities that the plaintiff had proven its case and was entitled to the relief sought. As for the defendants' counterclaim, the SCJ found that it was not proven and dismissed the counterclaim.

Held, allowing appeal in part; setting aside paras 1–2 and 4 of the sessions court judgment with costs of RM3,500 subject to allocator; and upholding the defendants counterclaim:

(1) The fact that the second defendant said that he was illiterate and did not know what he signed did not help him one whit, for there was no doubt that he had executed the agreement. After reviewing the evidence and examining exhs P1 and D1 the court found that the SCJ had handled this aspect of the case well and agreed with the SCJ that exhs P1 and D1 contained the same terms, there were no two versions of the same agreement and that the agreement was valid (see para 15).

(2) The defendants' allegations of fraud and cheating raised in this civil proceeding to dig themselves out of the situation they found themselves in were serious and criminal in nature, which warranted the lodging of police reports against the parties they were accusing. However, the second defendant admitted no police reports were lodged by him to support his fraud and/or cheating allegation(s). The omission to lodge any contemporaneous police report was fatal to the defendants' allegations of fraud and cheating against the plaintiff and such allegations may be construed as bare allegations (see paras 19–20).

(3) An examination and literal reading P1 and D1 revealed that except for the signatures, both had the same contents. Although the contract in the present appeal was termed a sale and purchase agreement, upon a careful reading, this court found that the document when read as a whole appears in truth to be a joint venture agreement. From an examination of the grounds of judgment of the SCJ, the court found that the provisions of the agreement were not dealt with adequately. If indeed there existed any ambiguity in the interpretation of the agreement in particular clauses, it was well settled that such ambiguity would be resolved against

A the plaintiff, who prepared the agreement — that the defendants were obliged to supply the technology, not to transfer it (see paras 32–33 & 35).

(4) The SCJ had completely failed to appreciate that 'technology' as set out in B the agreement was not some scientific knowledge but defined specifically as the nano water filtration system together with all rights, interest and benefits including handling methods and other related methods but did not include the formula of the nano water filtration system. In the circumstances, the SCJ should not have made a finding that the pilot C project failed because the defendants failed to give co-operation to disclose the contents of the formula in the water treatment system developed by the defendants (see para 38).

(5) There was not an iota of evidence to support the SCJ's finding that the D disclosure on the contents of the formula was the condition for SPAN to approve the project and thus the pilot project failed and as such the defendants breached the said clauses of the said agreement and that such defendants' failure resulted in the losses suffered by the plaintiff. The SCJ in so finding failed to give appropriate consideration that no evidence at E all was produced to show that the formula must be disclosed to SPAN as a condition of getting approval (see para 39).

(6) In reference to the defendants' contentions, the SCJ had erred in law and in fact in failing to give proper and appropriate consideration to the fact that the plaintiff's own witness, SP2, CEO of IWK confirmed that the F second defendant did not at any time say he was selling the formula or to disclose it. Further, the SCJ was wrong to overlook that SP2 agreed in cross-examination that IWK would be the appointed consultant to obtain SPAN approval for use of the technology for the water industry (see paras 43–44).

G (7) The court found that the defendants had no obligation to transfer the technology and formula or disclose the formula also supported by: (a) recital 7 p 53 vol 1 appeal records: formula will belong to the orphans to be determined by the defendants; (b) cl 4.3(iii) — purchaser will not H make any claim for the formula; (c) vol 2 appeal records, pp 299–SP3 when confronted in cross-examination agreed that the second defendant never intended to sell the formula technology, and further said it was meant for the orphans; and (d) SP2's evidence during cross-examination (see para 52).

I (8) The plaintiff's own witnesses and exhibits pointed to the fact that it was agreed that the defendants was to supply and not transfer the technology for the water treatment system and pilot plant to the plaintiff to treat polluted water and at no time did the defendants agreed to sell his formula or to disclose his formula. There was no escape by the plaintiff

from the evidence of its own witnesses to which it was bound. The evidence of the plaintiff's own witnesses when analysed and weighed up showed that the defendants were not in breach of agreement. There was no doubt that the sessions court on the totality of the irrefutable evidence with respect, failed to appreciate that it was more probable that this present case was of a joint venture and not a sale and purchase. Therefore, the defendants had no obligation to transfer the technology and formula or disclose the formula (see paras 54 & 57–58).

(9) The circumstances in this case did not show the agreement was void; if at all, it was only voidable at the option of the plaintiff. However, there was nothing on record to show that the plaintiff had exercised this right; there was no demand made by the plaintiff of the defendants to remedy any breach much less any termination of the agreement (see para 66).

(10) The plaintiff's real complaint was that the defendants had not disclosed their formula for the technology which was alleged by the plaintiff to be necessary to get the SPAN approval for the water treatment system. Firstly, this was not required of the defendants in the agreement and even if it was, it was a trivial breach for which the plaintiff would not be entitled to put the agreement to an end. This was because the defendants did not disable themselves from performing the agreement in its entirety such as to fit into the situation of 'the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract'. On the facts of the case, there was no total failure of consideration as the pilot plant had been installed and delivered. In the absence of fundamental breach by the defendants, the plaintiff was not entitled to terminate the agreement Further, the sessions court overlooked what was in a termination of a contract (see paras 67, 70 & 72).

(11) The plaintiff had proven nothing in establishing liability and as such the SCJ was plainly wrong to award this sum of RM137,561.90 to the plaintiff and such decision ought to be reversed by this court. The court was of the view that the SCJ had not analysed critically the totality of the evidence and the facts before him, as such, his ultimate decision was against the weight of and contrary to evidence taken as a whole. With respect, he ought to have found that the plaintiff had not proven its case on a balance of probabilities, and as such, was not entitled to the declaration nor any of the relief sought (see paras 90 & 92).

(12) In regard to the counterclaim, the defendants must have shown a causal connection between the plaintiff's breach and loss. However, on the facts of the case, the defendants had failed to prove actual loss, causation and remoteness. A such, the dismissal of the defendant's counterclaim was upheld (see paras 96 & 99).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan mahkamah sesyen yang membenarkan tuntutan plaintif untuk satu pengisytiharan bahawa perjanjian bertarikh 20 Ogos 2015 antara responden dan defendan pertama adalah tidak sah dan terbatal, jumlah RM787,661.90 dibayar oleh defendan kepada plaintif, faedah dan kos RM5,000 tuntutan balas defendan juga ditolak dengan kos RM3,000. Plaintif telah memasukki satu perjanjian jual beli (perjanjian tersebut) dengan defendan untuk satu jual beli bersama-sama dengan pengurusan dan penggunaan sistem tapisan air termasuklah pembelian tekonologi secara keseluruhannya dan logi pertama, termasuk semua peralatan yang terletak di logi rawatan kumbahan, indah water konsortium ('IWK') Cyberjaya dan RM150,000 sebagai kos pengurusan operasi yang perlu dijalankan pada loji pertama untuk dijalankan oleh Loji Rawatan Kumbahan IWK. Plaintif menuntut bahawa, dalam pelanggaran klausa 3.3, 4.1 dan 4.2 perjanjian tersebut, defendan telah gagal: (a) untuk memastikan teknologi tapisan adalah dibekalkan/dihantar dengan berjaya dan defendan juga tidak menyerahkan hak, kepeningan dan faiedah kepada plaintif seperti yang diperuntukkan dalam perjanjian tersebut; (b) pemindahan teknologi kepada plaintif walaupun masa telah diberikan; dan (c) untuk membantu dan memastikan produk tapisan air dan teknologi layak untuk mendapatkan kelulusan suruhanjaya pembekalan air nasional ('SPAN') apabila defendan gagal/engggan untuk memaklumkan isi kandungan formula yang terkandung dalam tapisan air yang merupakan satu syarat untuk SPAN memberikan kelulusan mereka; defendan, sebaliknya, menyatakan, antara yang lain, bahawa: (i) plaintif mengetahui bahwa defendan kedua buta huruf dan tidak membaca dan menulis; (ii) defendan tidak akan terlibat dalam mendapatkan kelulusan SPAN yang merupakan tanggungjawab plaintif; (iii) plaintif telah bertindak dengan curang terhadap defendan, antara yang lain, bahawa plaintif telah memperdaya dan memanipulasi defendan kedua untuk memasukki kontrak tersebut; (iv) plaintif telah membuat keuntungan tidak sah sebagai kerja untuk pembinaan sistem teknologi tapisan air yang telah diselesaikan dan diserahkan kepada plaintif; dan (v) defendan setelah selesai bahagian mereka melebihi apa yang dipersetujui dalam perjanjian tersebut akan tetapi tidak dibayar. Defendan oleh yang demikian telah membuat tuntutan balas terhadap plaintif. Kami Mahkamah Sesyen (HMS) telah mendapati atas imbangan kebarangkalian bahawa plaintif telah membuktikan kesnya dan berhak kepada relif yang dipohon. Berkenaan dengan tuntutan balas defendan, HMS mendapati bahawa ianya tidak dibuktikan dan telah menolak tuntutan balas tersebut.

Diputuskan, membenarkan sebahagian rayuan; mengetepikan perenggan 1, 2 dan 4 penghakiman mahkamah sesyen dengan kos RM3,500 tertakluk kepada allokatur dan membenarkan tuntutan balas defendan:

(1) Fakta bahawa defendan kedua menyatakan bahawa dia buta huruf dan

tidak mengetahui apa yang ditandatanganinya tidak membantunya langsung, kerana tiada keraguan bahawa dia telah melaksanakan perjanjian tersebut. Selepas meneliti keterangan dan ekshs P1 dan D1 mahkamah mendapati bahawa HMS telah menguruskan aspek kes ini dengan baik dan bersetuju dengan HMS bahawa eks P1 dan D1 mengandungi terma yang sama, tiada dua versi perjanjian tersebut yang sama dan perjanjian tersebut adalah sah (lihat perenggan 15).

(2) Pengataan frod dan penipuan yang dibangkitkan dalam prosiding civil ini untuk menggali diri mereka keluar dari keadaan ini adalah serius dan berbentuk jenayah, yang boleh menyebabkan laporan polis dibuat terhadap pihak yang mereka tuduh. Namun, defendan kedua mengakui bahwa tiada laporan polis telah dibuat olehnya untuk menyokong pengataan frod dan/atau penipuannya. Ketinggalan untuk membuat apa-apa laporan polis pada masa yang berkaitan adalah fatal kepada pengataan frod dan penipuan defendan terhadap plaintif dan pengataan tersebut boleh dikatakan sebagai pengataan kosong semata-mata (lihat perenggan 19–20).

(3) Satu penelitian dan pembacaan tersurat P1 dan D1 menunjukkan bahawa kecuali untuk tandatangan, kedua-duanya mempunyai kandungan yang sama. Walaupun kontrak dalam rayuan ini disifatkan sebagai perjanjian jual beli, selepas membacanya dengan teliti, mahkamah ini mendapati bahaw dokumen tersebut apabila dibaca secara keseluruhannya merupakan satu perjanjian usahasama. Daripada penelitian alasan penghakiman HMS, mahkmaah mendapati peruntukan perjanjian tidak ditangani secara mencukupi. Sekiranya wujud sebarang keraguan dalam penafisiran perjanjian dalam klausa tertentu, ianya telah diputuskan bahawa keraguan tersebut akan diselesaikan dengan tidak memihak kepada plaintif yang menyediakan perjanjian tersebut — bahawa defendan mempunyai tanggungjawab untuk membekalkan teknologi tersebut, bukannya untuk memindahkannya (lihat perenggan 32–33 & 35).

(4) HMS terpelajar gagal untuk mengamati bahawa teknologi yang dinyatakan dalam perjanjian tersebut bukanlah satu pengetahuan sains tetapi ditafisirkan secara terperinci sebagai sistem penapisan air nano berserta dengan semua hak, kepentingan dan faedah termasuk cara mengadalikan dan tatacara lain tetapi tidak melibatkan formula sistem tapisan air nano tersebut. Dalam keadaan ini, HMS tersebut tidak sepatutnya membuat dapatan bahawa projek pertama tersebut gagal kerana defendan gagal untuk memberikan kerja sama untuk memaklumkan isi kandungan formula dalam sistem tapisan air yang dimajukan oleh defendan (lihat perenggan 38).

(5) Tiada satupun keterangan untuk menyokong dapatan HMS bahawa pendedahan isi kandungan formula merupakan syarat untuk SPAN

meluluskan projek dan oleh yang demikian projek pertama telah gagal dan oleh yang demikian, defendan telah melanggar klausa perjanjian tersebut dan bahawa kegagalan defendan telah menyebabkan kerugian yang dialami oleh plaintiff. HMS dalam membuat dapatan tersebut gagal untuk menimbangkan sewajarnya bahawa tiada keterangan dikemukakan untuk menunjukkan bahawa formula tersebut mesti didedahkan kepada SPAN sebagai syarat untuk mendapatkan kelulusan (lihat perenggan 39).

(6) Merujuk kepada pengataan defendan, HMS telah terkhilaf disisi undang-undang apabila gagal untuk menimbangkan secara sewajarnya fakta bahawa saksi plaintif sendiri, SP2 CEO IWK mengesahkan bahawa defendan kedua tidak pada bila-bila masa menyatakan bahaw dia menjual formula tersebut atau mendedahkannya. Lanjutan itu, HMS juga terkhilaf apabila tidak menimbangkan bahawa SP2 bersetuju sewaktu pemeriksaan balan bahawa IWK akan dilantik sebagai jururunding untuk mendapatkan kelulusan SPAN untuk penggunaan teknologi tersebut dalam industri air (lihat perenggan 43–44).

(7) Mahkamah mendapati bahawa defendan tidak mempunyai tanggungjawab untuk memindahkan teknologi dan formula atau untuk mendedahkan formula juga disokong oleh: (a) resital 7 ms 53 *Jld* 1 rekod rayuan: formula akan dimiliki kepada anak yatim yang akan ditentukan oleh defendan; (b) klausa 2.3 (iii) — pembeli tidak akan membuat apa-apa tuntutan untuk formal tersebut; (c) jilid 2 rekod rayuan, ms 299–SP3 apabila disoal dalam pemeriksaan balas bersetuju bahawa defendan kedua tidak pernah berniat untuk menjual teknologi formula, dan juga menyatakan bahawa ianya adalah untuk anak yatim; dan (d) keterangan SP2 sewaktu pemeriksaan balas (lihat perenggan 52)

(8) Saksi plaintif sendiri dan ekshibit menunjukkan fakta bahawa ianya dipersetujui bawha defendan perlu membekalkan dan bukannya memindahkan teknologi untuk sistem tapisan air dan loji pertama kepada plaintif untuk merawat air tercemar dan tidak pernah defendan bersetuju untuk menjual formulanya atau untuk mendedahkan formulanya. Tiada jalan keluar untuk plaintif daripada keterangan saksinya sendiri yang mana ianya terikat kepada. Keterangan bahawa saksi plaintif sendiri, setelah dianalisa dan diimbangkan menunjukkan bahawa defendan tidak melanggar perjanjian tersebut. Tiada keraguan bahwa mahkamah sesyen atas keseluruhan keterangan yang tidak boleh dinafikan, gagal untuk mengamati bahawa ianya lebih berkebarangkalian bahawa ini merupakan kes usahasama dan bukannya jual beli. Oleh itu, defendan tiada tanggungjawab untuk memindahkan teknologi dan formula atau untuk mendedahkan formula tersebut (lihat perenggan 54 & 57–58).

(9) Keadaan kes ini tidak menunjukkan bahawa perjanjian tersebut terbatal;

ianya hanya boleh dibatalkan pada pilihan plaintif, namun, tiada apa-apa yang menunjukkan bahawa plaintif telah melaksanakan hak tersebut; tiada apa-apa tuntutan yang dibuat oleh plaintif kepada defendan untuk memulihkan apa-apa pelanggaran apatah lagi menamatkan perjanjian tersebut (lihat perenggan 67, 70 & 72).

(10) Aduan sebenar plaintif adalah bahawa defendan tidak mendedahkan formula mereka untuk teknologi tersebut yang dikatakan oleh plaintif adalah perlu untuk mendapatkan kelulusan SPAN untuk sistem tapisan air tersebut. Pertama, ini tidak diperlukan oleh defendan dalam perjanjian, dan sekiranya ianya diperlukan, ianya merupakan satu pelanggaran yang remeh yang mana plaintif tidak berhak untuk menamatkan perjanjian tersebut. Ini adalah kerana defendan tidak menghalang diri mereka daripada melaksanakan perjanjian tersebut secara keseluruhannya untuk menjadi satu keadaan 'kegagalan mana-mana pihak untuk melaksanakan tanggungjawab utama mereka yang mempunyai kesan untuk menghalang pihak yang lain sebahagian besar faedah yang merupakan niat pihak-pihak bahawa dia sepatutnya peroleh daripada kontrak'. Atas fakta kes, tiada kegagalan keseluruhan loji pertama yang telah dipasang dan diserahkan. Dalam ketiadaan pelanggaran asas defendan, plaintif tidak berhak untuk menamatkan perjanjian tersebut. Lanjutan itu, mahkamah sesyen terlepas pandang apa yang wujud dalam penamatan satu kontrak (lihat perenggan 67, 70 & 72).

(11) Plaintif gagal untuk membuktikan liabiliti dan oleh yang demikian HMS adalah salah secara jelas untuk memberikan awad berjumlah RM137,561.90 kepada plaintif dan keputusan sedemikian sepatutnya diterbalikkan oleh mahkamah ini. Mahkamah ini berpendapat bahawa HMS tidak meneliti secara kritikal keseluruhan keterangan dan fakta dihadapannya. Dia sepatutnya mendapati bahawa plaintif telah membuktikan kesnya atas imbangan kebarangkalian, dan oleh itu, tidak berhak untuk sebarang deklarasi atau relif yang dipohon (lihat perenggan 90 & 92).

(12) Berkaitan dengan tuntutan balas, defendan perlu menunjukkan hubungan antara pelanggaran plaintif dan kerugian. Namun, berdasarkan fakta kes, defendan telah gagal untuk membuktikan kerugian sebenar, sama ada ianya luar duga, dan penyebaban. Oleh yang demikian, penolakan tuntutan balas defendan dikekalkan (lihat perenggan 96 & 99)]

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Legislation referred to

Contracts Act 1950 ss 25, 26, 27, 28, 29, 30, 31, 40
Evidence Act 1950 ss 103, 115

Zalina Hashim (Muhammad Azharuddin with her) (Z Hashim & Co) for the appellants.
Noor Azlina (Mohd Noor Eswandy and Nor Shaheeda with her) (Nor Iyani, Eswanddy & Co) for the respondent.

Liza Chan JC:

[1] This appeal by the appellants emanates from the decision of the learned sessions court judge dated 3 October 2019 in allowing the respondent's claim for a declaration that the agreement dated 20 August 2015 between the respondent and the first appellant is null and void, a sum of RM787,661.90 to be paid by the appellants to the respondent, interest and costs of RM5,000; the counterclaim of the appellants was also dismissed with costs of RM3,000.

[2] In this appeal, the appellants and the respondent will be referred to as the defendants and plaintiff respectively.

THE CLAIM AND THE DEFENCE AND COUNTERCLAIM

[3] The plaintiff claimed that:

(a) it entered into a sales and purchase agreement dated 20 August 2015 (the agreement) with the defendants for sale and purchase together with the management and use of the water filtration system including the purchase of technology as a whole including a pilot plant at sum of RM650,000 (jual beli penapisan air berserta pengurusan dan juga penggunaan system penapisan air termasuk pembelian teknologi kepada Plaintif secara keseluruhannya termasuk logi perintis) for which RM500,000 of the said sum is the costs of technology and pilot plant, including all equipment which is located at the Sewerage Treatment Plant, Indah Water Consortium (IWK), Cyberjaya and RM150,000 being costs of management operations which need to be carried out on the pilot plant to be carried out at IWK's Sewerage Treatment Plant;

(b) the salient terms of the agreement are cll 3.3, 4.1 and 4.2 which are produced *in extenso*:

Clause 3.3:

3.3 *Aku Janji Penjual untuk memulangkan pembayaran yang telah dibuat*: A

Sekiranya terdapat masalah untuk memindahkan milik teknologi daripada Penjual kepada Pembeli, atau sekiranya terdapat apa-apa percanggahan mengenai butiran teknologi seperti tuntutan oleh pihak lain terhadap teknologi atau teknologi terbukti tidak berkesan seperti yang dijamin oleh Penjual atau apa-apa perkara lagi yang boleh menyebabkan Pembeli mengalami kerugian termasuklah tidak mematuhi Perjanjian, Penjual akan memulangkan jumlah pembayaran yang telah dibuat oleh Pembeli tanpa apa-apa faedah. B

Clause 4.1. C

4.1 *Kewajipan dan sekatan ke atas Penjual semasa Jual Beli dan Tempoh Operasi*: Bermula dari tarikh pembayaran pendahuluan, Penjual mempunyai kewajipan dan sekatan berikut:

(i) Memindah milik Teknologi dan Loji Perintis kepada Pembeli supaya Pembeli menjadi pemilik, dan pengedar tunggal kepada Teknologi; D

(ii) Menjadi pembuat dan pembekal teknologi ini kepada Pembeli sahaja;

(iii) Memasang teknologi dan menjalankan kerja-kerja Operasi untuk tujuan 'Pilot Project' bagi mendapatkan Kelulusan;

(iv) Menjalankan kerja-kerja baikpulih teknologi sekiranya teknologi mengalami kerosakan ketika operasi teknologi di Loji Perintis dijalankan. Kos baikpulih perlu dikira dan dimaklumkan kepada Pembeli terlebih dahulu sebelum kerja baikpulih dijalankan. Pembeli hanya akan mengeluarkan kos baikpulih sekiranya kerosakan yang berlaku adalah disebabkan kecuaian dari pihak Pembeli sahaja. Sekiranya kerosakan berlaku disebabkan kegagalan Penjual mengawal selia atau menyediakan teknologi dengan tepat, kos baikpulih ditanggung sepenuhnya oleh Penjual; E F

(v) Memberi maklumat sepenuhnya kepada Pembeli mengenai Teknologi supaya Pembeli dapat menguruskan operasi Teknologi ini dengan sendiri bagi tujuan pengendalian dan pemasaran; G

(vi) Memberi maklumat sepenuhnya mengenai peluang pasaran dan membenarkan pembeli mencari dan memasuki pasaran lain;

(vii) Melatih operator teknologi yang dilantik oleh Pembeli berkenaan teknologi sehingga operator benar-benar faham dan mahir; H

(viii) Mencari, mengenal pasti dan memilih waris dalam tempoh operasi ini untuk mewarisi dan diajarkan cara penyediaan, pemasangan dan operasi teknologi bagi tujuan perbekalan sewaktu ketiadaan Penjual;

(ix) Tidak membuat inovasi terhadap teknologi bagi pasaran lain tanpa mendapatkan persetujuan bersama dengan Pembeli dan membenarkan Pembeli untuk membuat penambahbaikan tanpa perubahan kepada Teknologi serta memenuhi keperluan Pembeli untuk membuat penambahbaikan tersebut; I

(x) Tidak mendaftarkan teknologi ini di bawah paten atas nama selain daripada nama Pembeli sama ada di Malaysia atau di negara lain;

(xi) Tidak memasang teknologi ini dan tidak menjalankan operasi ini bagi tujuan dan maksud yang sama seperti Perjanjian ini atau bagi tujuan dan maksud lain dengan pihak ketiga atau pihak-pihak lain; dan

(xii) Atas persetujuan diantara Penjual dan Pembeli, membiayai kos sampingan yang diperlukan untuk menjayakan Operasi bagi mendapatkan Kelulusan.

Clause 4.2

4.2 *Sekiranya perkara diatas tidak dipatuhi*: Perjanjian ini boleh, atas kehendak Pembeli dianggap terbatal dan Penjual hendaklah memulangkan jumlah pembayaran yang telah dibuat serta menanggung apa-apa liabiliti dan kerugian kesan daripada pelanggaran atau terbatalnya Perjanjian ini.

(c) it has paid the full sum of RM650,000 as required under the agreement;

(d) that notwithstanding full payment the defendants in breach of agreement failed:

(i) to ensure that the water filtration technology is successfully supplied/delivered nor did the defendants provide the rights, benefits and interest to the plaintiff as provided in the agreement;

(ii) to transfer the technology to the plaintiff despite being given time; and

(iii) failed to assist and ensure that the water filtration products and technology is eligible to obtain the National Water Service Commission (SPAN)'s approval when the defendants refused/failed or deliberately refuse to disclose the contents of the formula contained in the water filtration which is a condition for SPAN to grant the approval;

(e) that at the advice of the defendants, the plaintiff incurred a further sum of RM137,561.90 as initial operating costs at the installation site of the technology to ensure that the technology is successfully used; and

(f) as a result of the defendants' failure and default, the plaintiff suffered and continued to suffer loss.

[4] The defendants on the other hand in its defence alleged that:

(a) the plaintiff was aware that the second defendant is illiterate and does not read and write;

(b) the plaintiff agreed to use the services of the defendants to build and install a water treatment pilot plant requested by the plaintiff at the site

designated by the plaintiff to serve as the plaintiff's pilot project to present the water technology system to IWK;

(c) for any contract entered into by the plaintiff with IWK, the contract will be in the plaintiff's name but the said system will be used and will be supplied by the defendants in the plaintiff's name;

(d) the defendants will not be involved in getting SPAN approval which is the plaintiff's own responsibility;

(e) the second defendant, being illiterate thought when he signed the agreement that the agreement was to build and install a water treatment technology system as the plaintiff's pilot project with IWK as explained to him by the plaintiff's lawyer ('SP1'), the plaintiff's representative one Abdul Aziz bin Mohamad Yusuf ('SP3') and Datuk Ir Abdul Kadir (SP2, and introduced previously to second defendant as CEO of IWK), and that he was later informed that the plaintiff's lawyer (SP1) is in fact Datuk Ir Abdul Kadir 's son who is also a director of the plaintiff;

(f) that the defendants had never agreed to enter into any agreement to sell the defendants' water treatment technology system as a whole:

(i) the second defendant was misled into signing the agreement as he had believed the plaintiff's representatives; that after signing the agreement, the second defendant gave the signed documents directly to Datuk Ir Abdul Kadir;

(ii) the defendants only received a copy of said agreement in 2018 after their solicitors requested for a copy when the defendants received a letter of demand from the plaintiff's solicitors;

(iii) after the agreement was read to the second defendant, he found the contents were not what was explained and shown to him; that his signature was not on every page; the agreement was entirely different;

(iv) the second defendant had never signed the agreement dated 20 August 15;

(v) the second defendant had signed every page of the agreement but the copy given to the defendants' solicitors did not have the second defendant's signature on every page; and

(vi) the agreement has been changed.

(g) that the plaintiff had acted fraudulently towards the defendants interalia in that the plaintiff had misled and manipulated the second defendant into entering into the contract;

(h) they never agreed to sell the defendants' water treatment technology system as a whole but instead only agreed to construct the system for a

pilot plant using the defendant's water technology system which was to treat polluted water into clean water;

(i) that the first defendant had completed and handed over construction of the water treatment technology of the pilot project as promised to the plaintiff;

(j) that the works the defendants did was over and above what was agreed;

(k) the plaintiff had made an unlawful gain as the works for the construction of the water treatment technology system had been completed and handed over to the plaintiff; the defendants having completed his part of the bargain in excess of what was agreed in the agreement but was not paid; and

(l) that the plaintiff's failure in getting contracts from IWK was not their responsibility.

[5] In its reply and defence to counterclaim, the plaintiff, inter alia, alleged:

(a) that it was not aware that the second defendant is illiterate and that in law, illiteracy does not prevent one from entering into a contract;

(b) that the defendants were not misled into signing the agreement;

(c) the defendants have signed an agreement where amongst others, to realise the project, the plaintiff is to purchase the technology, formula and the equipment set out in Schedule 3 of the agreement; and

(d) that the defendants failed to complete the works as pursuant to the agreement, the defendants not only has to install the technology system but responsible to ensure the plaintiff or relevant authorities like SPAN know the basic contents of the formula for approval purpose and only after getting SPAN's approval, the plaintiff is qualified to apply for contracts from IWK.

DECISION OF THE SESSIONS COURT

[6] The learned sessions court judge in his judgment was satisfied and found that:

(a) the plaintiff had proven on a balance of probability that it was entitled to seek declaratory relief without showing a cause of action citing the cases of *Tan Sri Othman Saat v Mohamed Ismail* [1982] 2 MLJ 177 and *Affin Bank Berhad v Mohd Kasim Ibrahim* [2013] 1 MLJ 465 — para 56 of judgment;

(b) that the plaintiff bore the burden of proof that:

(i) the agreement dated 20 August 2015 is valid;

(ii) the defendants signed the agreement; A

(iii) the defendants breached the agreement; and

(iv) the plaintiff had suffered losses — para 58 of judgment.

(c) on a balance of probability through the evidence of SP1, SP2, SP3 and SD1 that: B

(i) parties had discussed the agreement to be signed and the scope of the agreement;

(ii) that at all material times, SD1 (the second defendant) had informed the plaintiff that he is illiterate and that the plaintiff knew it was dealing with an illiterate person; and C

(iii) plaintiff and defendants know in detail the project to be carried out together as a result of the discussions and for the second defendant to say at this stage that he does not know what he was signing is an afterthought — para 59 of judgment. D

(d) that from SP1 and SD1's evidence, the agreement with the plaintiff was signed by the defendants through SD2 — para 60 of judgment;

E

(e) from SP1 and SP2's evidence, SD1 signed the agreement after it was explained to him by SP1 and SP2 and from the evidence, SD1 knew what he was signing and understood and agreed to the terms of the agreement as appearing in exh P1. SD1 had not denied he did not sign the agreement — para 60 of judgment; F

(f) the defendants and the plaintiff agreed to enter into the sale and purchase agreement dated 20 August 2015 (the agreement) where parties agreed to a sale and purchase of the water filtration together with the management and use of the water filtration system including the purchase of technology to the plaintiff as a whole including a pilot plant at a sum of RM650,000 — para 61 of judgment; G

(g) that the sums stated in the statement of claim has been paid, admitted by the defendants and received by them — para 62, para 66 of judgment;

H

(h) from the evidence of SP1 and SP3, that the plaintiff on the advice of the defendants had incurred a sum of RM137,561.90 as initial operating costs at the installation site of the technology to ensure that the technology is successfully used and these costs were paid to IWEK, SPAN and workers as costs of operation on the advice of the defendants citing s 115 of the Evidence Act and the case of *Pickard v Sears* [1837] 6 Ad & E1 at p 469 referred in *Public Textiles Berhad v Lembaga Letrik Negara* [1976] 2 MLJ 58 — para 67 of judgment; I

(i) when alleged to have breached the terms of the agreement, the defendants had stated that the plaintiff had manipulated the second defendant who was illiterate by changing the pages of the agreement and cheated the defendants — para 64 of judgment.

From the evidence of SP1, SP2 and SP3, that the second defendant had signed two agreements on the material date. The defendant had signed exh P1 in full but did not sign exh D1 in full because he felt signing P1 was enough. The sessions court accepted that SP1, SP2 and SP3 were telling the truth although denied by the second defendant, the learned sessions court judge had made this finding based on how the second defendant answered questions in court and that his demeanor show that he was not serious; the most telling example according to the learned sessions court judge was when asked why he did not make a police report if he knew he was cheated by the plaintiff and his answer was 'Memang saya tak buat, buat apa nak buat' and referred p 205 of notes of proceedings and the questions and answers regarding the lack of a chemist report — para 64 of judgment.

Once the second defendant had signed the agreement, he is bound and it does not matter whether or not he read the agreement — para 65 of judgment.

That according to SP1, SP2 and SP3, the defendant had failed to transfer the technology and pilot plant to the plaintiff as intended by the agreement; the defendants also failed to install the technology for the purpose of the pilot project to get SPAN's approval, and SPAN's approval cannot be obtained because the defendants refused to co-operate with SPAN resulting in no approval being obtained from SPAN and as such has breached cll 3.3, 4.1 and 4.2 of the agreement — para 68 of judgment.

That based on SP1, SP2 and SP3's evidence, the balance of probability is that the plaintiff entered into the agreement with the defendants with the purpose of them getting the technology that was developed by the defendants; the method is with the consent of the defendants who developed the pilot project which will later be given approval by SPAN, where the technology will be transferred through the PILOT Project. But what happened was the Pilot project was not ready to get approval from SPAN because the defendants failed to:

(i) install the technology system; and

(ii) co-operate by disclosing the contents of the formula in the water filtration developed by them to the plaintiff or to SPAN. This is a condition for SPAN to approve the project and without such information caused the pilot project to fail to be ready to get SPAN's approval and as such breached cll 3.3, 4.1 and 4.2 of the

agreement resulting in the plaintiff suffering loss — para 69 of judgment.

(j) with the above findings, found on a balance of probability that the plaintiff had proven its case and entitled to the relief sought with costs of RM5,000; and

(k) as for the defendants' counterclaim, found that it was not proven and the counterclaim was dismissed with costs of RM3,000.

LAW ON APPELLATE INTERVENTION

[7] In hearing this appeal, this court as an appellate court is reminded that it should be slow to interfere with the findings of fact of a trial judge. Reference is made to *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 where the Federal Court at p 527 (MLJ); p 175 (CLJ) said:

> It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusion reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy.

[8] In *Lee Chee Keong v Fadason Holdings Sdn Bhd* [2017] MLJ 728, the Court of Appeal citing the judgment of Nallini Pathmanathan JCA (later FCJ) in *MMC Oil & Gas Engineering Sdn Bhd v Tan Boon Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428 held that appellate interference is only warranted where no reasonable judge could have reached the same conclusion of the trial judge:

> [15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires something more. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.

[9] The Federal Court in *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577 at p 591–593; [2010] 6 CLJ 857 at pp 873–875 had this to say:

> [41] Before we leave this subject and move on to the next two questions, *we feel a need to remind that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour. Thus, unless the trial judge is plainly wrong in his finding, the appellate court should not reverse a finding of fact by the trial judge*. This

'plainly wrong' test has been long established and can be observed in the Judicial Committee of the Privy Council pronouncement in *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; [1978] 1 LNS 32 where Lord Fraser said:

> In the face of that finding by the trial judge on the question of fact the Federal Court were *only entitled to displace his conclusion if they were satisfied that his view was plainly wrong* and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion, as the authorities already quoted show.

[42] Before stating this, Lord Fraser cited two cases in support which we find appropriate to repeat as a reminder to all appellate courts of their role in dealing with a finding of fact by a trial judge.

[43] The first is Lord Tankerton in *Watt or Thomas v Thomas* [1947] AC 487:

> (1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself as a judge, an appellate court which is disposed to come to a different conclusion on printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
>
> (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen or heard the witnesses, and the matter will then become at large for the appellate court.

[44] The second is from Viscount Sankey LC in *Streatham Manor Nursing Home* [1935] AC 36, 36 who said:

> ... it is perfectly true that an appeal is by way of rehearing, *but it must not be forgotten that the Court of Appeal does not rehear the witnesses*. It only reads the evidence and rehears the counsel. Neither is it reseeing the court. There are different meanings to be attached to the word 'rehearing'. For example the rehearing at the Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appearing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after trial before a judge alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there have been a conflict of evidence the Court of Appeal will have special regard to the fact that the trial judge saw the witnesses: see *Clarke v Edinburgh Tramways Co*: per Lord Shaw, 1919 SC (HC) 35,36, where he says:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to creditability or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice in the ordinary case things are much more evenly divided; witness without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in their nuance, of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed pages. What in such circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of the appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question: Am I who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? *If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment (emphasis added)*.
>
> [45] The above principle is reiterated by this court in *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309. (Emphasis added.)

[10] The Court of Appeal has also in the case of *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 clearly stated that:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[11] It is also trite that apart from a wrong application of the law, insufficient judicial evaluation of the evidence also justifies appellate intervention — *Lee Ing Chin & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 where the Court of Appeal speaking through Gopal Sri Ram JCA (as he then was), stated the need to assess the evidence and to weigh them and for good reasons accept or reject them accordingly, as follows:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves. *A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by*

> *assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him.* He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.(Emphasis added.)

[12] The above statement of law on the need to assess, weigh and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before the court was affirmed by the Federal Court in *Gan Yook Chin & Anor v Lee Ing Chin & Ors* where the Federal Court said:

> 14 In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

DECISION OF THIS COURT

[13] The present appeal is addressed with the foregoing principles in mind. The core issues in this appeal is whether the agreement (exh P1 is valid) and if so, did the defendants breach the terms as to entitle the plaintiff to the relief sought.

Is the agreement valid?

[14] In this regard, the law is settled on the effect of the execution of agreements. It binds the parties regardless of whether the parties have read or understood the contents.

[15] The fact that the second defendant ('SD1') said that he is illiterate and did not know what he signed does not help him one whit, for there is no doubt that he had executed the agreement. He admitted as much but instead proffered another copy marked as exh D1 where not every page was signed by him. This court after reviewing the evidence and examining exhs P1 and D1 finds that the learned sessions court judge had handled this aspect of the case well and agrees with the learned sessions court judge that exhs P1 and D1 contain the same terms, there are no two versions of the same agreement and that the agreement is valid.

[16] It is trite that when a document containing contractual terms is signed, in the absence of fraud or misrepresentation, the party signing it is bound by its terms, and it matters not whether he has read it or not, let alone understood the document.

[17] The Court of Appeal in *Lin Wen-Chih & Anor v Mycom Bhd* [2014] 3 MLJ 691 in dismissing a claim of *non est factum* explained:

> [21] The principle, a person is bound by his contract regardless that he is ignorant of the language it is written in, is well established. The case of *Subramaniam v Retnam* [1966] 1 MLJ 172; [1965] 1 LNS 169 referred to *Ismail bin Savoosah & Ors v Hajee Ismail* [1889] 4 Ky 453 at p 458 where Wood AG CJ said:
>
> It was argued that the defendant being ignorant of the English language he is to be excused on that account from the performance of his contract, but it is to my mind clear that in the common principles which govern the law of contract, the person who contracts by a written document, whether or not he understands the language in which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition no objection was authoritatively sustained ...
>
> [22] *Non est factum* is Latin for 'it is not my deed'. A successful plea of *non est factum* makes the contract or document signed void ab initio. A plea of *non est factum* means that they signed the two documents by mistake. Mistake, however, is not so much because one does not know the contents of the documents that one is signing, but that it was or turned out to be of a character entirely different from what is thought to be signed.

[18] In the case of *Hap Seng Credit Sdn Bhd v Mohamed bin A Ralim & Ors* [2016] 10 MLJ 761, Mohd Nazlan J stated as follows:

> I should, for completeness, add that the argument that the respondents had not been in the know of the transactions and that the first respondent having merely signed blank forms and did not understand English, and thus ought not to be responsible for the same is not only unsupported with evidence, but also not justified under the law. *It is well-established in the law of contract that a person who is a party to a written contract is bound by the terms of the contract whether or not he understands the language in which it is documented, in the absence of fraud or misrepresentation* (see *Subramanian v Retnam* [1966] 1 MLJ 172).

[19] The defendants' allegations of fraud and cheating raised in this civil proceeding to dig themselves out of the situation they found themselves in are serious and criminal in nature, which warrants the lodgment of police reports against the parties they are accusing. However, the second defendant admitted no police reports were lodged by him to support his fraud and/or cheating allegation(s).

[20] This court finds that the omission to lodge any contemporaneous police report police report is fatal to the defendants' allegations of fraud and cheating against the plaintiff and such allegations may be construed as bare allegations. I refer to the following cases in this regard.

[21] In *Soo Lip Hong v Tee Kim Huan* [2006] 2 MLJ 49; [2005] 4 CLJ 119; [2005] 1 MLRA 801, the Court of Appeal held that the absence of a contemporaneous police report when duress was alleged did little to support such a claim. Mohd Ghazali Yusoff JCA (as he then was) said:

> There was also no evidence of any police report or similar thing alike to suggest that PW1 was attempting to cheat DW1. In the absence of such evidence, the only irresistible factual inference I could draw would be for purpose(s) of purchasing the relevant property by PW1 from DW1 as agreed by both parties as evidenced by P1.

[22] In *Chong Wan Ping v Chow Chee Yan* [2009] MLJU 897; [2009] 1 LNS 834 (High Court), it was held:

> For an allegation of fraud in a civil proceeding, it must be shown that a contemporaneous police report must be lodged. Otherwise, the allegations are merely bare allegations. Here, no police report was lodged against the defendant ... Therefore the claim by the plaintiff that the defendant had defrauded them must fail. *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1 (refd); *Floral Trends v Li Onn Floral Enterprise (M) Sdn Bhd* [2006] MLJU 339; [2006] 6 CLJ 525 (foll); *Paldraman a/l Palaniappan & 2 Ors v Lachemi a/p Sanganayar* [1992] 4 CLJ 1870; [1992] 3 CLJ Rep 188 (folld); *Soo Lip Hong v Tee Kim Huan* [2005] 4 CLJ 119 (folld); *David Wong Hon Leong v Noorazman bin Adnan* [1995] 4 CLJ 155 (folld).

What is the bargain of the parties/interpretation of the agreement

[23] It does not necessary follow and it must not be readily assumed that if the agreement is valid, that the defendants are in breach.

[24] As to what exactly has been agreed by the parties is a matter of law to be decided by the court as it relates to construction of the contract. See *Silver Concept Sdn Bhd Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 10:

12 The construction of a contract is a question of law to be determined by this court. This court is not bound by the admission of witnesses or the concession made by counsel in the court below.

[25] *Silver Concept* was referred to by the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1 where Jeffrey Tan delivering the judgment of the court authoritatively said:

[156] It must be more than settled that the construction of a document is a question of law. In *Munusamy v Public Services Commission* [1964] 1 MLJ 239, where on the construction of an article of the Constitution which forbids the dismissal or reduction in rank of certain persons unless a certain condition is complied with, that is that the person concerned be given a reasonable opportunity of being heard, Thomson LJ said 'That question of construction is a question of law ...'. In *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759, Yong Pung How CJ said 'we must approach the construction of the document, which is a question of law, untrammelled by any concession as to the meaning of the agreement that might have been given by the court below'. 'It is trite that a question of construction is a question of law and not fact (see *Bahamas International Trust Co Ltd and another v Threadgold* [1974] 1 WLR 1514 (HL)' (*Bintulu Development Authority v Pilecon Engineering Bhd* [2007] 2 MLJ 610 per Nik Hashim JCA, as he then was, delivering the judgment of the court). In *Bahamas International Trust Co Ltd and another v Threadgold* , Lord Diplock said 'that the construction of a written document is a question of law', which was followed in *Tan Suan Heoh v Lim Teck Ming & Ors* [1987] 2 MLJ 466, *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38, *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101, *Padiberas Nasional Bhd v Kontena Nasional Bhd* [2010] 3 MLJ 134*, and The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 *and Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2017] 9 MLJ 1*). In Desa Teck Guan Koko Sdn d v Sykt Hap FohBh Hing (suing as a firm)* [1994] 2 MLJ 246, Ian Chin J opined that ...

[26] Lord Diplock observed in *Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514:

In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; a fortiori in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.

[27] As such, in the present case, it matters not a jot what the plaintiff or the defendants thought what their entitlements under the agreement dated 20 August 2015 with each other were. Neither does it matter to the court what the parties' witnesses thought of the way in which the agreement ought to be interpreted. Their views are absolutely irrelevant.

[28] It is also a basic rule in the law of contract that what have been agreed by contracting parties should be given effect to. The Federal Court in *Michael C Solle v United Malayan Banking Corporation* [1986] 1 MLJ 45 said as follows:

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole agreement.

[29] In *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546; [2009] 1 CLJ 786, Abdul Malik Ishak JCA also stated the following key principles:

> [15] Of course, it is trite that when interpreting a contract the language of the contract must be taken into consideration. The intention of the parties is to be primarily gathered from the language employed in the contract itself. If, and only if the language is vague, the surrounding circumstances may be looked into in order to assist in interpreting the contract (*Bipin Behari Deb v Masrab Ali and Others* [1961] AIR Vol 48, 173 Assam).
>
> [16] I am fortunate that the contract here is in writing and so the parties are confined within the four corners of the document in which they have chosen to seal their agreement and neither of them can adduce evidence to say that his intention has been misstated or overlooked in the agreement or that some essential features of the contract has been omitted or ignored. *To allow such evidence would involve the plain v'iolation of s. 92 of the Evidence Act 1950* (*Afshar M M Tacki v Dharamsey Tricamdas* [1947] AIR (34) 98 Bombay).
>
> [17] From the available authorities, the following propositions may be advanced in construing a contract where the language employed is clear:
>
> (a) the court must give effect to the plain meaning of the words, no matter how distasteful the result may be (*The Central Bank of India Ltd Amritsar v The Hartford Fire Insurance Co Ltd* [1965] AIR Vol 52, 1288 SC);
>
> (b) where the language in the document is unambiguous and clear, the real nature of the document is to be determined solely by looking at its contents, uninfluenced by any intention of the parties ((*Nawab Major Sir) Mohammad Akbar Khan v Attar Singh and Others* [1936] AIR Vol 23, 171 PC);
>
> (c) when the minds of the parties are expressed in an unambiguous manner, the court cannot override the declared intention of the parties

unequivocally expressed (*K Appukuttam Panicker and Another v SKRAKR Athappa Chettiar and Others* [1966] AIR Vol 53, 303 Kerala); and

(d) there is no scope, at all, for drawing upon hypothetical considerations or the supposed intention of the parties when the words contained in the contract are clear and unambiguous (*The Union of India v Kishorilal Gupta and Bros* [1959] AIR Vol 46, 1362 SC).

[20] Again, Lord Wilberforce in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (Trading as HE Hansen-Tangen), Yngvar Hansen-Tangen (Trading as HE Hansen-Tangen) v Sanko Steamship Co*[1976] 1 WLR 989, 995, 996, aptly said:

In a commercial contract it is certainly right that the Court should know the commercial purpose of the contract and this in turn pre-supposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[21] There is also a rule of evidence that should be mentioned here. It is this. That the whole of the contract should be examined before construing an individual part of it (per Lord Halsbury in *Glynn and Others v Margetson & Co and Others* [1893] AC 351 at p 357).

[30] There is also a general rule that the intention of the parties must be ascertained from the words used in the agreement and extrinsic evidence will not be admitted to contradict or vary the clear terms of an agreement. See *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357. Similarly, evidence of prior negotiations will not be accepted to explain the meaning of any ambiguous wording.

[31] Courts will also construe a document based on its contents and not by what the document is identified or described by the parties. The label of the document is inconsequential, and at best of secondary importance. Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court of Appeal in *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141; [1996] 3 CLJ 26 made the following observations:

At this stage, I digress from the narrative to deal with the nature of this document. No doubt it is described as a guarantee. *But in the construction of contracts the court is not bound by the labels that parties choose to affix onto the particular document. In all such cases the duty of the court is clear. And that duty is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport.* As Jenkins LJ observed in *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513 at p 528; [1957] 3 All ER 563 at p 570; [1957] 3 WLR 980 at p 991:

... *the relationship is determined by the law, and not by the label which the parties choose to put on it*, and that it is not necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties. (Emphasis added.)

[32] Bearing the above principles in mind, what then had the parties bargained for in the agreement? An examination and literal reading P1 and D1 reveal that except for the signatures, both had the same contents. Although the contract in the present appeal is termed a sale and purchase agreement, upon a careful reading, this court finds that the document when read as a whole appears in truth to be a joint venture agreement. Not that it adds anything, this is tacitly admitted by SP3 — Vol 2 appeal records, pp 303–304.

[33] The learned sessions court judge found on a balance of probability based on the evidence of SP1, SP2 and SP3 at p 43 of the supplementary appeal record that the purpose of the agreement was for the plaintiff to obtain the defendants' technology developed by the defendants. But does the agreement really say that? From an examination of the grounds of judgment of the learned sessions court judge, with respect, I find that the provisions of the agreement were not dealt with adequately.

[34] The agreement in the wording it is casted, amongst others show:

(a) cl 4.1(i) and (ii) are contradictory — cl 4.1(i) says the defendants are to transfer the technology and pilot plant to the plaintiff; yet cl 4.1(ii) only oblige the defendants to install the technology and operation works for the 'pilot project' to get approval;

(b) the second schedule of warranties at pp 80–81 Vol 1 appeal records, cl 10 says the defendants will supply the technology only for the purpose of supply and supply will always be provided at each request of the plaintiff;

(c) cl 11 provides that the defendant will chose the beneficiary 'dalam tempoh Operasi Teknologi' and will teach the beneficiary everything regarding the technology three months after approval is obtained to ensure supply of the technology will last;

(d) 'tempoh operasi' means commencing from payment of deposit until approval is obtained;

(e) 'operasi' means the operation to carry out the 'Pilot Project' with the purpose to get approval from SPAN. The procedure and 'tempoh operasi' to obtain the approval to be fixed by the relevant authorities like SPAN and IWK;

(f) 'kelulusan' means approval from SPAN to use the technology in the water industry (polluted water);

(g) 'Teknologi' means the nano water filtration system together with all rights, interest and benefits including handling methods and other related methods but do not include the formula of the nano water filtration system;

(h) cl 1.3 specifically provided all words, expressions, or phrases shall be construed in accordance with the objectives of the construction of this agreement and if there is a conflict or conflict of meaning for the words, expressions or phrases in the agreement, the conflict and discrepancy shall for the purposes of this agreement be resolved through:

(i) give preference to the words, expressions or phrases contained in this agreement as compared to the Initial Reading or Schedule; and

(ii) give preference to words, expressions or phrases contained in the Schedule compared to initial reading.

CONTRA PROFERENTUM

[35] My view is if indeed there exists any ambiguity in the interpretation of the agreement in particular cll 4.2(i) and (ii), cll 10 and 11 of the Second Schedule, it is well settled that such ambiguity would be resolved against the plaintiff, who prepared the agreement — that the defendants are obliged to supply the technology, not to transfer it.

[36] Lord Brightman in the Privy Council's case of *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85; said:

> There is a principle of construction that if a document inter parties contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

[37] This issue too was addressed by the Federal Court in *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440; [2019] 10 CLJ 731 where Alizatul Khair Osman FCJ elucidated:

> [98] Coming to the contra proferentum rule, it provides that where a term is ambiguous, such ambiguity ought to be construed against the party who prepared it. In general contracts, common law courts have been quick to apply against 'unfair terms' like exclusion or exemption clauses. But the rule sees particular application in insurance contracts. This point is aptly summarised in MacGillivray on *Insurance Law* (12th Ed), at pp 317–318:
>
> The common law rule of construction, that verba chartarum forties accipiuntur contra proferentum, means that ambiguity in the wording in a policy, or slip, is to be resolved against the party who prepared it. It has been said that a party who proffers an instrument cannot be permitted to use ambiguous words in the hopes that the other party understand them in a particular sense and that the court which has to construe them will give them a different meaning, but the ambiguity usually arises inadvertently from including conflicting standard printed clauses in the same policy.

No or insufficient judicial appreciation of the evidence

[38] The learned sessions court judge completely failed to appreciate that 'technology' as set out in the agreement before the court is not some scientific knowledge but defined specifically as the nano water filtration system together with all rights, interest and benefits including handling methods and other related methods *but do not include the formula* of the nano water filtration system; how then can the sessions court find that the pilot project failed because the defendants failed to give co-operation to disclose the contents of the formula in the water treatment system developed by the defendants?

[39] There is not an iota of evidence to support the sessions court's finding that the disclosure on the contents of the formula is the condition for SPAN to approve the project and thus the pilot project failed and as such the defendants breached cll 3.3, 4.1 and 4.2 of the said agreement and that such defendants' failure resulted in the losses suffered by the plaintiff. The learned sessions court judge in so finding failed to give appropriate consideration that no evidence at all was produced to show that the formula must be disclosed to SPAN as a condition of getting approval. With respect, he overlooked that:

(a) SP2 and SP3 actually admitted there is no evidence produced to state that to get SPAN approval, the contents of the formula must be disclosed to SPAN;

(b) SD1 in cross examination stated that the application to SPAN was to be made by the plaintiff (p 217 *Jld* 2 appeal records);

(c) during cross examination, it was elicited from the plaintiff's same witnesses that there are no documents produced to show that the plaintiff ever made any application to SPAN for approval; and

(d) the plaintiff knowing that the second defendant is illiterate can hardly expect the defendants to initiate the application for approval to SPAN.

[40] By also failing to bear at the forefront of his mind what technology as unequivocally defined in the agreement means, the learned sessions court judge also failed to give credence in favour of the defendants that all three plaintiff's witnesses had testified that the pilot project was successfully installed, and delivered to the plaintiff. The pictures in exh P25 show the water treatment plant was built and delivered.

[41] SP1 confirmed the plant was built, tested and was able to filter polluted water to clean water (pp 217–218, 224 *Jld* 2 appeal records).

Page 217–218:

S: Untuk loji perintis ini tadi pilot projek ini dibuat maka rawatan air ini ada tak dibuat test rawatan air?

J: Ada.

S: Jadi keputusan-keputusan rawatan semua adalah?

J: Keputusan rawatan air. Ada.

S: Ada tak dalam mana-mana dalam agreement ini keputusan rawatan air?

J: Tiada.

S: So, keputusan rawatan air menunjukkan air ini boleh ditukar tak daripada air kumbahan kepada air bersih oleh pihak Defendan?

J: Boleh tukar apa. Macam mana. Sekali lagi soalan dia?

S: Daripada keputusan rawatan air yang dibuat adakah ia menunjukkan bahawa penggunaan sistem Defendan ini boleh menukar air kumbahan kepada air yang bersih?

J: Boleh.

S: Jadi luluslah. Luluslah bahawa daripada air kumbahan dia boleh jadi air yang bersih, setuju?

J: Setuju.

Page 224:

S: Daripada gambar di mukasurat 52–55 bundle B. Ini gambar yang En Hafiz kata En Hafiz yang ambil gambar sendiri itu. Daripada 52–56. So, semua ini adalah tangki-tangki tank yang dibina oleh pihak Defendan, setuju?

J: Setuju.

S: So, En Hafiz juga kata tadi bahawa air telah pun diuji. Air kumbahan boleh diuji. Jadi setuju tak dengan cadangan saya. Ini cadangan saya. Saya cadangkan bahawa Defendan telah pun menyempurnakan keseluruhan kerja-kerja Defendan untuk membina loji perintis ini kepada Plaintif, setuju tak?

J: Untuk membina?

S: Yes, untuk membina.

J: Untuk membina dan sempurna.

Page 227:

S: Dan setuju tak saya kata pilot projek ini pun telah disiapkan. Telah dibina dan dipasang.

J: Betul.

[42] SD1 also testified that the defendants had delivered the plant to the plaintiff and had trained the plaintiff's workers on how to use the system. The

learned sessions court judge however disregarded SD1's evidence completely without undertaking a critical analysis of the total evidence before him as precisely warned by the Federal Court in *Gan Yook Chin & Anor v Lee Ing Chin & Ors*. He found in para 64 of his judgment that SD's demeanor show he was not serious when SD1 was asked why he did not make a police report on his allegations of fraud.

[43] Specifically, in reference to the defendants' contentions, the learned sessions court judge had erred in law and in fact in failing to give proper and appropriate consideration to the fact that the plaintiff's own witness, SP2, CEO of IWK confirmed that the second defendant did not at any time say he was selling the formula or to disclose it.

[44] Not only that, the learned sessions court judge was wrong to overlook that SP2 agreed in cross examination that IWK would be the appointed consultant to obtain SPAN approval for use of the technology for the water industry (Vol 2, p 262 para 5 (ii)) and repeated this at p 263.

[45] That is not all. The preamble in P1 states that IWK will be the consultant to get approval. This to me makes sense and more probable as the director of the plaintiff (SP1) is SP2's son and SP2 is the CEO of IWK. SP2 at p 263 Vol 2 appeal records agreed during cross examination that it is IWK as the consultant who applies for the SPAN approval.

[46] In *Dynasty Dragon Seafood Restaurant (PJSS2) Sdn Bhd & Ors v SSTwo Mall Sdn Bhd* [2018] MLJU 1915, Stephen Chung JCA, delivering the judgment of the court, said that the aid of the heading or preamble can only be taken when there is some doubt about the meaning of the terms or provisions in the contract:

> [30] Where the terms of a contract are clear, precise and unambiguous, it must be applied according to its plain meaning. The aid of the heading or preamble can only be taken when there is some doubt about the meaning of the terms or provisions in the contract: see *Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83. cl 7.2.5 is part of cl 7.2. Its heading reads 'Power for Landlord to deal with Demised Premises, adjoining property and/or the Building.

[47] However, it is to be noted that *Tan Boon Liat* concerned the interpretation of a statute.

[48] In *Doughty Hanson & Co Ltd v Roe* [2007] EWHC 2212 (Ch); [2007] All ER (D) 56 (Oct), Mann J agreed that 'heading is descriptive of what the provision is about (that is doubtless the 'convenience' — see *SBJ Stephenson Ltd v Mandy* [2000] FSR 286 at p 297)'.

[49] In my view, the preamble may be taken into consideration in construing an agreement; it appears at the forefront of the document and puts in writing the intention of the parties at the outset.

[50] In addition, the plain definitions in the agreement as agreed by the parties should not be interpreted in a sense different from that which they bear. Holding otherwise will run counter to the decision of the Court of Appeal in *Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd* [2017] 2 MLJ 819; [2016] 8 CLJ 211 at p 221 speaking through Vernon Ong JCA (as he then was) stated as follows:

> [33] As a general rule, the words of an instrument must be construed according to their natural meaning. Where the language of a document is plain and unambiguous and applies accurately to existing facts then the intention of the parties to the document should be gathered from the language of the document itself. No amount of acting by the parties can alter or qualify words which are plain and unambiguous: see s 94 of the Evidence Act 1950; *North Eastern Railway Company v Hastings* [1900] AC 260 (PC).
>
> [34] Accordingly, when a court is called upon to interpret a document, it looks at the language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the court is not to delve into the intricacies of the human mind to disclose one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions: see *Kamla Devi v Takhatmal* AIR 1964 vol 51 a Supreme Court of India decision at p 386.
>
> [27] It is axiomatic that it is the duty of the court to give effect to the clear intention of the parties as expressed in cl 5(b) of the agreement which is in clear, unambiguous and unmistakable language. In the Central Bank of India Ltd, *Amritsar v. Harford Fire Insurance Co Ltd AIR* [1965] SC 1288 it was held that:
>
> Now it is common place that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[51] See also the same court's decision in *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 2 CLJ 337 which held as follows:

> [27] It is axiomatic that it is the duty of the court to give effect to the clear intention of the parties as expressed in cl 5(b) of the agreement which is in clear, unambiguous and unmistakable language. In the *Central Bank of India Ltd, Amritsar v Harford Fire Insurance Co Ltd AIR* [1965] SC 1288 it was held that:
>
> Now it is common place that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the

intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[52] Besides the foregoing, I find that the defendants have no obligation to transfer the technology and formula or disclose the formula is also supported by:

(a) recital 7 p 53 Vol 1 appeal records — formula will belong to the orphans to be determined by the defendants;

(b) cl 4.3(iii) — purchaser will not make any claim for the formula;

(c) vol 2 appeal records, pp 299 — SP3 when confronted in cross-examination agreed that the second defendant never intended to sell the formula technology, and further said it was meant for the orphans; and

(d) SP2's evidence during cross–examination at p 257, 258 Vol 2, appeal records:

P/Def: Terima kasih Tuan. Saya katakan sepanjang tempoh perbincangan yang lebih daripada 5 kali itu, Haji ataupun Defendan kedua ini hanya bersetuju untuk membekalkan teknologi rawatan air, menukar air kumbahan di IWK kepada air bersih, setuju tak?

J: Setuju.

S: Setuju tak saya katakan bahawa Defendan kedua ini tidak pernah pada bila-bila masa kata yang dia akan jual formula dan dedahkan formula teknologi rawatan air ini tadi?

J: Setuju.

S: Setuju tak saya katakan Defendan kedua ini adalah dia akan bekalkan dan membuat loji perintis di IWK untuk syarikat Plaintif?

J: Maksudnya?

S: Maksudnya ialah loji-loji yang dibuat oleh Haji, dia buat dan loji perintis itu dia buat adalah untuk syarikat Plaintif bukan untuk diri dia untuk syarikat Plaintif dan bukan untuk IWK?

J: Betul.

S: Jadi itulah sebenarnya kandungan didalam perjanjian ini?

J: Betul.

S: Setujukan?

J: Setuju.

[53] Recitals may be taken into account in the interpretation of a contract — *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng @Tan Tien Chi & anor* [1995] 1 MLJ 719 at p 747:

> It is a cardinal rule in the interpretation of contracts that recitals may be taken into account as an aid to construction and this is all the more so where there is ambiguity in the document. Further, in an appropriate case, the court may construe a recital as carrying with it an obligation to carry into effect that which is recited.

Plaintiff bound by its own witnesses

[54] I find that the plaintiff's own witnesses and exhibits point to the fact it was agreed that the defendants was to supply and not transfer the technology for the water treatment system and pilot plant to the plaintiff to treat polluted water and at no time the defendants agreed to sell his formula or to disclose his formula — Vol 2 pp 257–258.

[55] Pursuant to the decision of the Court of Appeal in *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14 at p 47; [1998] 3 CLJ 769 at p 788, it is well established that a party is bound by the evidence of witnesses whom he calls in proof of his case and this rule is enforced with full rigour in civil cases.

[56] In *Kheam Huat Holdings Sdn Bhd v The Indian Association, Penang* [2000] 7 MLJ 74; [2000] 1 LNS 355, Abdul Hamid Embong J (as His Lordship then was) applied the principle in *Lim Guan Eng*'s case) and held that the plaintiff was bound by the evidence of its witness, even if it is damning in some parts.

[57] I see no escape by the plaintiff from the evidence of its own witnesses to which it is bound. In my opinion, the evidence of the plaintiff's own witnesses when analysed and weighed up show that the defendants are not in breach of agreement.

[58] In these circumstances, I am left in no doubt that the sessions court on the totality of the irrefutable evidence with respect, failed to appreciate that it was more probable that this present case admits of a joint venture and not a sale and purchase.

WHO BEARS THE BURDEN?

[59] The plaintiff had asserted that its claim is under s 40 of the Contracts Act 1950 and contended that it is entitled to the relief sought.

[60] I find the claim unmeritorious for the basic reasons as alluded to earlier that the plaintiff had not shown any evidence, other than bare assertions, to

prove its contention that the pilot project failed because it was a SPAN condition that the formula be disclosed due to the defendants' breach of agreement.

[61] The law on this is well settled, such as set out by s 103 of the Evidence Act 1950 that he who asserts must prove. Why are the SPAN letters not produced to show the formula must be given to them before approval of the technology can be given? Nothing at all was offered by the plaintiff as evidence in this respect. Notwithstanding of course that the agreement itself says in Schedule 2 that the defendants are only to name its heir for all matters relating to the Technology 3 months after approval is obtained. I also find that there is a patent lack of evidence that application was in fact made by the plaintiff or IWK for SPAN's approval.

[62] I have in mind the Court of Appeal case of *Juahir bin Sadikon v Perbandaran Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1, Siti Norma Yaakob JCA (as she then was) instructively held as follows:

> *He who alleges must prove such allegation and the onus is on the appellant to do so. See section 103 of the Act*. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under section 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. *There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case.* For this very reason too, the adverse inference under section 114(g) is invoked against the appellant. (Emphasis added.)

[63] As such, the absence of supporting evidence cannot advance the plaintiff's case.

Is the agreement void as to entitle the plaintiff to the declaration?

[64] It was held by the Privy Council in *Ooi Boon Leong & Ors v Citibank NA* [1984] 1 MLJ 222; [1984] 1 LNS 26 that when the Contracts Act intends to render an agreement void, it would say so in express terms as found in ss 25–31 therein. The sections deal with the following subject:

> 25 Void Agreements
>
> Agreements void if considerations and objects unlawful in part

26 Agreement without consideration, void, unless — (a) it is in writing and registered; (b) or is a promise to compensate for something done; (c) or is a promise to pay a debt barred by limitation law

27 Agreement in restraint of marriage void

28 Agreement in restraint of trade void Exception 1 — Saving of agreement not to carry on business of which goodwill is sold; Exception 2 — of agreement between partners prior to dissolution; Exception 3 — or during continuance of partnership

29 Agreements in restraint of legal proceedings void Exception 1 — Saving of contract to refer to arbitration dispute that may arise Exception 2 — Saving of contract to refer questions that have already arisen.

30 Agreements void for uncertainty

31 (1) Agreements by way of wager void (2) Exception in favour of certain prizes for horse racing.

[65] For a starters, it must be borne in mind that the agreement does not state a time limit for the defendants to carry out their obligations.

[66] The circumstances in this case in my view do not show the agreement is void; if at all, it is only voidable at the option of the plaintiff. Lamentably however, there is nothing on record to show that the plaintiff has exercised this right; there was no demand made by the plaintiff of the defendants to remedy any breach much less any termination of the agreement as required by notice in cl 8.2 of the agreement at p 69 of Vol 1 appeal records which, inter alia reads:

Dalam tempoh tujuh (7) hari selepas serahan notis penamatan:-

(i) Pembeli berhak menuntut semula kos teknologi;

(ii) Pembeli berhak menuntut semula kos operasi teknologi;

(iii) Pembeli berhak menuntut semula kos-kos sampingan; dan

(iv) Pembeli berhak menuntut semula apa-apa kos kerugian termasuk lima belas peratus (15%) daripada kos teknologi dan kos operasi sebagai ganti rugi.

[67] The plaintiff's real complaint was that the defendants have not disclosed their formula for the technology which was alleged by the plaintiff to be necessary to get SPAN approval for the water treatment system. Firstly, I find that this is not required of the defendants in the agreement and even if it is, in my judgment, it is a trivial breach for which the plaintiff would not be entitled to put the agreement to an end. This is because the defendants did not disable themselves from performing the agreement in its entirety such as to fit into the situation of 'the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract' — per

Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556.

[68] The principle encapsulated in *Hongkong Fir Shipping Co Ltd v Kawasaki Kaisha Ltd* [1962] 2 QB 26, which made clear that the breach if at all, was not so great as to frustrate the entire contract, nor was the breach regarded as a condition, going to the root of the contract which would entitle the other party at once to treat the contract as at an end also militates against the plaintiff.

[69] For the plaintiff to rely on s 40 of the Contracts Act, there has to be a total failure of consideration or a fundamental breach that goes to the root of the contract. In support, I refer to *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010 1 MLJ 597 where the Federal Court held:

> On the factual matrix of this case ss 56(1) and 40 of the Act ought to be read together. When the two sections were read together it clearly showed that the right to rescind a contract by way of termination only arose when there had been a total failure of consideration. However, the facts of the present case showed that the appellant had completed the construction of the project and the respondent's lot was in a state of delivery. As such the respondent's entitlement in this case was confined and limited to compensation in the form of the LAD clause in the agreement and the respondent had no right to rescind the agreement.

[70] There is no total failure of consideration here as the pilot plant as alluded to earlier had been installed and delivered. In the absence of fundamental breach by the defendants, the plaintiff was not entitled to terminate the agreement.

[71] In *Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo (suing for and on behalf of Ng Hua's estate, deceased)* [2010] 3 MLJ 633, the Court of Appeal held:

> The essence of time in the SPA came under s 56(1) of the Act and the failure of consideration was within the ambit of s 40 of the Act. Section 40 must be read conjunctively with s 56(1) when determining whether the defendant as a promisor had committed a breach of such a nature that went to the root of the contract ie a fundamental breach. The transfer of the consideration was a 'fundamental term', a breach of which constituted a fundamental breach. That fundamental breach entitled Madam Ng to rescind the contract and to have the parties restored to a position where they would stand as if the SPA had never been made ie the return of the property by way of restitutio in integrum to Madam Ng, and, upon her death, to her estate.'

[72] That is not all. With respect, the sessions court also overlooked what is entailed in a termination of a contract. In *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464, the Federal Court upheld the two tier process for termination, when it held that there was no freestanding right

to terminate:

> [74] Under cl 9, the review procedure gives the opportunity for the respondent to review the appellant's performance, but this is by no means unilateral as a matter of procedure. The terms of cl 9 make this clear. Clause 9.1 for instance, oblige the parties to agree upon the terms and conditions of the review prior to any review occurring. This is clearly meant to protect the interests of both parties, that is to say the interest of the respondent in ensuring that the unsatisfactory situation is remedied (whether by the appellant, or where there is discharge or termination, by its substitute), and the interest of the appellant in avoiding breach and termination of the contract. Arguably the purpose of this clause leans in favour of protecting the position of the appellant against wilful termination for one, and to provide an added layer of protection.

[73] In *Perbadanan Menteri Besar Kelantan v Syarikat Perusahaan Majubina Sdn Bhd* [2016] 4 MLJ 570, the Court of Appeal also upheld the two-tier process for termination:

> [15] In our view, it is quite clear from a reading of cl 51 that while the appellant has a right to determine the contract for any of the reasons or defaults set out in cll 51(a)(i)–(v), *it is obliged to first of all, through the SO, issue a notice of default*. The respondent is given 14 days to get its act together, to bring its work up to speed or deal with any of the other complaints identified by the appellant or SO. The object of such a notice is to warn the respondent of the possibility of drastic action of determination of contract. At the same time, it affords the respondent an opportunity to remedy the particular default complained of. *Once such a notice has been issued, then the appellant is entitled to determine the employment of the respondent without further notice where the respondent either continues in the default or subsequently repeats the default*. In view of the detrimental and sometimes referred to as the 'draconian' step as it serves to bring the contract to an end, there must also be strict compliance of cl 51. (Emphasis added.)

[74] In the instant case, as it was in *SPM Membrane* and *Perbadanan Menteri Besar Kelantan v Syarikat Perusahaan Majubina Sdn Bhd*, it was strictly a matter of what the agreement provided.

[75] An objective approach to the construction of the agreement would produce the result that there was no freestanding right to terminate the agreement, except in accordance with the mechanism in cl 8. To terminate the agreement, the plaintiff must comply with cl 8.2 to serve a notice of termination. It did not do so.

[76] In *DC Contractor Sdn Bhd v Universiti Pertahanan Malaysia* [2014] 11 MLJ 633, Mary Lim J (as she then was), held that 'When interpreting and constructing termination clauses in particular, a strict approach ought to be adopted':

A [56] When interpreting and constructing termination clauses in particular, a strict approach ought to be adopted. This was the view expressed in Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd [1998] 6 MLJ 80 which was discussed with approval by the Court of Appeal in Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113. Although the court in Fajar Menyensing Sdn Bhd was
B discussing about the service of the notice of termination, I am of the view that this applies with equal force when dealing with the operation and application of the whole termination clause; and not merely an aspect of it. This case is no exception. The provisions of cl 51 ought to be given a strict interpretation since its application has decisive and far-reaching implications to the relationship and contractual obligations of the contracting parties. That impact includes ending relationships,
C and freeing parties from their respective obligations; or conferring on them certain rights following a proper right of termination, if there is such a right.

[77] In *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113, the Court of Appeal, per Gopal Sri Ram JCA (as he then was) delivering
D judgment of the court, held that there are many authorities to support a strict constructionist approach:

[17] But that is not the case here. Quite the opposite. No doubt, the arbitrator held the notice of termination to be contractually flawed. In doing so, he took a strict
E constructionist approach. And there are many authorities which support such a view. See, for example, *Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd* [1998] 6 MLJ 80. This is because

... a forfeiture clause in a building contract will be strictly construed to see whether the operative event has occurred or not

F See, *Central Provident Fund v Ho Bock Kee* [1981] 2 MLJ 162, per Wee Chong Jin CJ.

[78] Any formal or procedural requirement stipulated in the termination clause must be complied with strictly and meticulously. It did not happen in
G the present case for there was no termination notice.

[79] The cases of *Tan Sri Othman Saat v Mohamed Ismail* [1982] 2 MLJ 177 and *Affin Bank Berhad v Mohd Kasim Ibrahim* [2013] 1 MLJ 465 as appearing in the judgment at page 29 of the supplementary record pertain to threshold
H locus standi to seek a declaration but whether the plaintiff is entitled for substantive reasons to the declaration in the terms as sought in the present case is a different cup of tea altogether. The Court of Appeal in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals* [1977] 3 MLJ 23 at pp 40–41 set out the distinction between the threshold and the
I substantive locus standi as follows:

In public law — and, in so far at least as the appellants in the first and second appeal are concerned, the summons in the present instance lies in public law - there are two kinds of locus standi. The first is the initial or threshold locus standi: the second is the substantive locus standi.

> Threshold locus standi refers to the right of a litigant to approach the court in relation to the facts which form the substratum of his complaint. It is usually tested upon an application by the defendant to have the action struck out on the ground that the plaintiff, even if all that he alleges is true, cannot seek redress in the courts.
>
> Although a litigant may have threshold locus standi in the sense discussed, he may, for substantive reasons, be disentitled to declaratory relief. This, then, is substantive locus standi. The factors that go to a denial of substantive locus standi are so numerous and wide ranging that it is inappropriate to attempt an effectual summary of them. Suffice to say that they range from the nature of the subject matter in respect of which curial intervention is sought to those settled principles on the basis of which a court refuse declaratory or injunctive relief.

[80] I find the plaintiff is not entitled to the declaratory relief sought for the reasons given above.

DAMAGES

[81] Even if am wrong in my view that there is no breach by the defendants, there is irrefragably no basis whatsoever for the sum of RM137,561.90 to be awarded to the plaintiff.

[82] Special damages:

(a) must be specifically pleaded — *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324;

(b) must be itemised — *Ong Ah Long v Dr S Underwood*;

(c) belong to those class of damages that can be calculated and computed in monetary terms — *Johore State Economic Development Corp v Queen Bee Sdn Bhd* [1995] 4 MLJ 371;

(d) must be strictly proven and the plaintiffs cannot simply write down the particulars and leave it to the trial court to decide — *Johore State Economic Development Corp v Queen Bee Sdn Bhd* [1995] 4 MLJ 371; and

(e) the exact loss must be pleaded where the precise amount of item of damages had become clear before the trial either because it has already occurred and so become crystallised or because it can be measured with complete accuracy — *Macgregor on Damages* (14th Ed) p 1012 para 1498.

[83] The burden of proving damages is always on the parties claiming the damages — See *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672; [1987] 1 LNS 79 where Justice Edgar Joseph Jr (as he was then) said:

A This brings to my mind the famous words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel* [1948] 64 TLR 177:

Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost, I ask you to B give me these damages. They have to prove it.

[84] The principles that emerge from Zainun Ali JCA (as she then was) in *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229 on proving loss or damages are instructive: C

(a) the plaintiff must produce all necessary supporting documents. In *Sony*'s case the plaintiff failed to produce the documents to support the audited statements of account. This proved to be fatal;

D (b) the plaintiff must lead evidence on the computation or breakdown of the loss. The plaintiff failed to do so in *Sony*.

(c) the causal connection must also be shown. In *Sony*'s case, the plaintiff failed to prove the contents of the reduction in the volume of services and how this related to the alleged breach of the agreement; and E

(d) a summary of particulars or sheet of calculations or summary of accounts do not prove the contents. They are nothing more than conclusions. They must be proven by calling the maker to explain the facts and basis of calculation. In addition, the books to support the F calculation *must* be in evidence.

[85] The following passages in the Court of Appeal's judgment is apposite:

[62] In fact, the court in the KPM Khidmat observed the case that(at pp 631–632):

G ... *The mere fact that the summary of the particulars were made could never be taken as proving that the contents were correct. It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount claimed. Moreover the record book upon which the maker based her summary must be in evidence* ...

[63] Thus, the respondent's failure to observe the evidential requisites in this case H would prove to be his undoing.

[81] The respondent was at pains to distinguish the authorities relied upon by the appellant (ie *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 and *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627) on the grounds that the said cases do not involve audited accounts I being tendered as evidence.

[82] *However, it is our view that this distinction has no basis since the nature of an audited account in the instant case is no different from the 'sheet of calculations' tendered in the Popular case, or the 'summary of accounts' tendered in the KPM Khidmat case, as these documents are nothing more than general conclusions or results*

from the books of account or record books (Emphasis added.)

[86] As for marking and cross-examining the plaintiff on these documents, the Court of Appeal held:

> [67] Thus, even though the appellant's counsel had not called for the production of the accounts books or the necessary support documents the appellant had never at any point in time dispensed with formal and proper proof of damages (see *Guan Soon Tin Mining Co v Ampang Estate Ltd* [1973] 1 MLJ 25).
>
> [68] *By the same token we find that the appellant was not obliged to cross-examine Ramlan on his oral evidence thereon, when it is clear that the said audited statements of account and oral evidence were irrelevant and insufficient to establish the respondent's claim to damages.*
>
> [69] We might add that the mere fact that the audited statements were marked as exhibits in no way formalize their existence in the absence of correct and proper tendering thereof. This is especially true when the respondent had failed to discharge their duty to properly tender or prove the said audited statements. (Emphasis added.)

[87] *Sony Electronics* was cited in another Court of Appeal decision. In *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1, the Court of Appeal dismissed the appellant's appeal for, among other things, these reasons:

(a) failure to provide precise evidence on damages;

(b) failure to lead evidence of actual loss;

(c) no substantiation of figures;

(d) 'plucking figures out of the air';

(e) self-serving statements by the appellant's own officers without calling independent witnesses;

(f) claims for losses not suffered by the appellant for charged lands. The charged lands did not belong to the appellant. It belonged to PW2 but the appellant was claiming damages for the sale of the charged land; and

(g) appellant's failure to mitigate its loss.

[88] Some passages from the judgment merits production:

> [189] The person who is claiming damages must prove his case. Thus, the claimant in order to justify an award of substantial damages he must satisfy the court as to the fact of damage and as to its quantum (*Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd (Formerly STC Submarine Systems Ltd)* [1999] 2 Lloyd's Law Reports 423 (CA)).*If the claimant fails to satisfy the court on the fact of damage and quantum, then his action must fail or at the very least he would be awarded nominal damages where his right has been infringed.*

A [190] Put in another way, the claimant must show *actual loss* and evidence must be led in that direction. It is submitted that the appellant has failed to prove damages with precise evidence (*Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611 (CA); and *Ban Chuan Trading Co Sdn Bhd & Ors v Ng Bak Guan* [2004] 1 MLJ 411; [2003] 4 CLJ 785 (CA)) and that the appellant B has also failed to lead evidence to show actual loss. (Emphasis added.)

DAMAGES — WHAT THE PLAINTIFF MUST PROVE ASSUMING LIABILITY IS ESTABLISHED

C **[89]** Assuming liability is not in issue or is conceded to the plaintiff, the plaintiff must still:

(a) prove each and every ringgit claimed with precise evidence ('actual loss');

(b) prove a causal connection or factual link or necessary link between each D loss and the breach alleged ('causal connection'); and

(c) prove that the losses 'claimed' are not remote ('remoteness').

[90] With the aforesaid principles in mind, it is my view that the plaintiff has E proven NOTHING and as such the sessions court Judge is plainly wrong to award this sum of RM137,561.90 to the plaintiff and such decision ought to be reversed by this court.

[91] In *Henderson v Foxworth Investments Limited and Another* [2014] F UKSC 41, the UK Supreme Court speaking through Lord Reed considered the meaning to be accorded to the phrase 'plainly wrong':

> ... there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same G conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

H

[92] In all the circumstances, I am of the view that the learned sessions court judge had not analysed critically the totality of the evidence and the facts before him, as such, his ultimate decision is against the weight of and contrary to evidence taken as a whole. With respect, he ought to find that the plaintiff had I not proved it's case on a balance of probabilities, and as such not entitled to the declaration nor any of the relief sought.

Defendants had not proven its counterclaim

[93] I also find that the defendants had not proven their claim for general damages on a balance of probabilities. A

[94] The High Court in *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, Third Party)* [2011] 4 MLJ 354 at p 378, explained the law on general damages: B

> In *Halsbury's Laws of England* 4th Edn Reissue para 812, the distinction between 'general' and 'special' damages is well illustrated as follows:
>
> 'A distinction is frequently drawn between the terms 'general' and 'special' damages, which terms have different meanings according to the context in which they are used. In the context of liability for loss (usually in contract), general damages are those which arise naturally and in the normal course of events, whereas special damages are those which do not arise naturally out of the defendant's breach and are recoverable only where they were not beyond the reasonable contemplation of the parties (for example, where the plaintiff communicated to the defendant prior to the breach the likely consequences of the breach). The distinction between the two terms is also drawn in relation to proof of loss; here, general damages are those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms, whereas special damages, in this context, are those losses which can be calculated in financial terms. A third distinction between the two terms is in relation to pleading: here, special damage refers to those losses which must be proved, whereas general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the plaintiff is required only to assert that such damage has been suffered.; C D E

[95] In short general damages: F

(a) arise naturally and in the normal course of events;

(b) are not capable of precise quantification in monetary terms; and

(c) are presumed to be the natural or probable consequence of the wrong complained of. G

[96] The defendants must show a causal connection between the plaintiff's breach and loss.

> Requirement of a causal connection. The important issue in remoteness of damage in the law of contract is whether a particular loss was within the reasonable contemplation of the parties, *but causation must first be proved: there must be a causal connection between the defendant's breach of contract and the claimant's loss*. The claimant may recover damages for a loss only where the breach of contract was the 'effective' or 'dominant' cause of that loss. The courts have avoided laying down any formal tests for causation: they have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the claimant's loss. The answer to whether the breach was the cause of the loss or merely the occasion for the loss must 'in the end' depend on 'the court's common sense' in interpreting the facts — *Chitty on Contracts* (29th Ed) at para 26-029. H I

[97] The Singapore Court of Appeal used the term 'factual link' and 'necessary link' between the breach and loss in *Robertson Quay Investment Pte Lt v Steen Consultants Pte Ltd and Another* [2008] SGCA 8.

[98] Causation was stressed in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360:

> A word now about general principles. When a plaintiff claims damages from a defendant, *he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong*, and also that the damages are not too remote to be recoverable.

[99] On the evidence considered as a whole, I find the defendants have failed to prove actual loss, causation and remoteness.

[100] As such, this appeal is therefore partially allowed in that paras 1, 2 and 4 of the sessions court's judgment dated 3 October 2019 are set aside with costs of RM3,500 subject to allocator. The dismissal of the defendants' counterclaim is upheld.

Order accordingly.

Reported by K Selvaraju